2004 BNH 019 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 03-13860-JMD
Chapter 7

Peter S. Putney,
Debtor

Sandra Putney,
Plaintiff

v. Adv. No. 04-1032-JMD

Peter S. Putney,
Defendant

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MEMORANDUM OPINION

I. INTRODUCTION

Sandra Putney (the "Plaintiff") filed the above captioned adversary proceeding on February 13, 2004, seeking a determination that a certain obligation owed to her under a state court final divorce decree (the "Divorce Decree") by her ex-husband, the Debtor, is

nondischargeable pursuant to section 523(a)(5).[1] The Plaintiff did not seek a determination of nondischargeability under section 523(a)(15). The Court held a trial on July 19, 2004. This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The factual record is meager, for the reasons discussed hereafter. During the pendency of their divorce proceeding, on October 31, 2001, the Plaintiff was awarded alimony payments of $600 per month plus an additional $200 per month on account of a $2,400 arrearage.[2] Exhibit 2. The Divorce Decree, dated August 8, 2002, found that there was no longer any alimony arrearage and stated that, "Neither party is granted past, present or future alimony." Exhibit 1, ¶ 9. In paragraph 13 of the Divorce Decree the Court awarded the Plaintiff $7,000, "in complete satisfaction of all property claims." Exhibit 1, ¶ 13. The Plaintiff contends that the $7,000 debt is not entirely a property settlement, but that $5,700 of it was on account of an alimony arrearage.

III. DISCUSSION

This matter initially came before the Court on a pretrial hearing on April 29, 2004, following that hearing the Court issued a comprehensive Pretrial Scheduling Order (Doc. No. 7).

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[1] Unless otherwise indicated, all references to "section" refer to Title 11 of the United States Code.

[2] Neither party submitted the original alimony order.

Among other things the Pretrial Scheduling Order set a deadline of July 5, 2004, for the parties to submit witness and exhibit lists, a deadline of July 9, 2004, for the parties to submit their final pretrial statements and finally the parties were to submit a stipulated record of all portions of the divorce proceeding by July 9, 2004. The parties failed to comply with all of the abovementioned deadlines. The Plaintiff faxed a copy of her pretrial statement to the Court on July 15, 2004; however, because the Plaintiff did not comply with Local Bankruptcy Rule ("LBR") 9004-1(h), her pretrial statement is not part of the Court record. The Debtor filed his pretrial statement (Doc. No. 11) in open court on the day of the trial, negating its usefulness to the Court.

The disturbing sparseness of the record in this case did not end with the missing pretrial filings. There were no witnesses at the trial. Interestingly, neither Sandra Putney nor Peter Putney appeared at the trial and the documentary evidence was limited to a handful of state court documents that did not comply with the Court's Pretrial Scheduling Order regarding exhibits. Nevertheless, the Court agreed to accept the documents as exhibits after both parties stipulated to their inclusion in the record.

A. Section 523(a)(5)

Section 523(a)(5) of the Bankruptcy Code provides in relevant part:

> A discharge under . . . this title does not discharge an individual from any debt . . . to a spouse, former spouse, or child of the debtor . . . for alimony to, maintenance for, or support of such spouse or child, in connection with a . . . divorce decree . . .

11 U.S.C. § 523(a)(5). The crucial issue in determining whether a debt arising from a divorce decree is nondischargeable under section 523(a)(5) is whether the debt is actually in the nature of alimony, maintenance, or support rather than a property settlement. The determination of this issue is a question of federal bankruptcy law. See Bourassa v. Bourassa (In re Bourassa), 168 B.R. 8, 10 (Bankr. D.N.H. 1994); Coe v. Johnson (In re Johnson), 144 B.R. 209, 214 (Bankr. D.N.H.

1992). The party seeking the nondischargeability finding bears the burden of proof. See Zalenski v. Zalenski (In re Zalenski), 153 B.R. 1, 3 (Bankr. D. Me. 1993).

The issue of whether an obligation is in the nature of alimony, maintenance, or support turns solely on the issue of whether, at the time of the divorce, the obligation was intended to have such a purpose. See Bourassa, 168 B.R. at 10. In determining intent, the Court considers three primary factors: (1) the language and substance of the agreement or order; (2) the relative financial circumstances of the parties at the time of the agreement or order; and (3) how the payment at issue is structured (e.g., whether it is periodic or a lump sum, or whether it terminates upon the occurrence of a future contingent event). Smith v. Anderson (In re Anderson), 1999 BNH 034 (Bankr. D.N.H. 1999). "These factors are listed in descending order with respect to interpretative significance and will be used only as aids in resolving the question of intent." Id.

The Court finds that the Debtor's obligation to pay $7,000 to the Plaintiff in installments of $500 a month for 14 months is not in the nature of alimony, maintenance, or support but rather is a payment "in complete satisfaction of all property claims." Exhibit 1, ¶ 13. The language and substance of the Divorce Decree plainly indicate that the $7,000 obligation was intended as a property settlement. The state family court treated the obligation as a property settlement, rather than listing the $7,000 obligation under paragraph 9 of the Divorce Decree, titled "Alimony," which provides in part: "Neither party is granted past, present or future alimony...accordingly no arrearages are found." Exhibit 1, ¶ 9.

The Plaintiff has failed to present any admissible evidence to rebut the clear language of the Divorce Decree. While counsel for the Plaintiff attempted to provide an explanation for the Divorce Decree's characterization of the obligation, the Court reminds counsel that attorneys are not under oath when they present argument. Federal Rule of Civil Procedure 43 made applicable

in bankruptcy cases by Bankruptcy Rule 9017, requires the testimony of witnesses to be taken under oath in open court. Attorneys may present arguments or statements of fact outside of their personal knowledge. However, Federal Rule of Evidence 602 requires that the testimony of a witness rest upon a foundation of "personal knowledge of the matter." Statements by counsel not under oath are argument and not evidence.

Therefore, the Court is left with only the Divorce Decree and the other state court orders as the evidentiary record for its decision. Because the language in the Divorce Decree is unambiguous, judgment shall be entered for the Debtor.

IV. CONCLUSION

The Plaintiff has failed to meet her burden of proof to establish that the Debtor's $7,000 obligation to her is the kind of obligation described in section 523(a)(5) of the Bankruptcy Code, and accordingly, the obligation is dischargeable. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

ENTERED at Manchester, New Hampshire.

Dated: August 3, 2004

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge